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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

United States of America,

Plaintiff,

VS.

David Allen Harbour,

Defendant.

Case No. 2:19-cr-00898-DLR (DMF)

DEFENDANT'S BRIEF ON THE REBUTTABLE PRESUMPTION IN DETENTION HEARINGS

Defendant, David Allen Harbour (“Defendant”), submits his Opening Brief on the
“Rebuttable Presumption.”¹

BACKGROUND

At the very end of the continued detention hearing, the Government argued that, because the grand jury had indicted Defendant for “mortgage fraud,” the statute raised a “rebuttable presumption” the defendant needed to overcome showing that he would not be an economic threat to the community.

APPLICABLE LAW

¹ A Declaration from Harbour will be provided. It cannot accompany this filing due to the fact that absent an 88-mile round trip to CoreCivic, the only way to send or receive written papers to or from Harbour is via surface mail.

The issue is governed by the interplay between 18 U.S.C. § 3142(b) and 3148(b)(2), which provides in relevant part(s):

If there is probable cause to believe that, while on release, the person committed a Federal, State, or local felony, a rebuttable presumption arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community. If the judicial officer finds that there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will abide by such conditions, the judicial officer shall treat the person in accordance with the provisions of section 3142 of this title and may amend the conditions of release accordingly.

The government circumvented the Court’s *de novo* review of probable cause by having the grand jury charge Defendant with mortgage fraud. As the government will likely acknowledge almost every case involving “danger” is talking about a physical danger; not an economic danger. Economic danger only applies in “some cases.” *United States v. Reynolds*, 956 F.2d 192 (9th Cir. 1992). A recent District Court case, *United States v. Shields*, 2015 WL 900694 (February 24, 2015) noted that, while *Reynolds* was short on definitions, *United States v. Provenzano*, 605 F.2d 85, 95 (3rd Cir.1975), was not nearly so limited. If anything like the *Provenzano* standard applies, Defendant should be released. Once the Defendant has rebutted the presumption, the ordinary considerations of §1342(b) come into play.

ARGUMENT

I. Defendant poses no economic danger to the community, and the rebuttable presumption under 18 U.S.C. § 3142(b) is easily met.

In *Reynolds*, the court cited to the 3rd Circuit's decision in *United States v. Provenzano* for an instance where an individual poses an economic danger to the

1 community. 605 F.2d 85, 95 (3rd Cir.1975). Provenzano was found to pose an economic
 2 danger because of three preexisting economic crime *convictions*, not simply probable
 3 cause findings. *Id.* at 96. Additionally, had he been released, Provenzano retained a
 4 position within the community (the underworld) that would allow him to exert substantial
 5 influence.
 6

7 Reynolds saw a similar situation to Provenzano in that the defendant had already
 8 been convicted. The court stated that the danger the defendant posed could include
 9 economic harm. 956 F.2d at 192. This, simply put, is not even remotely close to the
 10 situation of Harbour. Harbour is *charged* with a mortgage fraud in which every other
 11 participant will never be charged.
 12

13 However, before delving into the weakness of the “new” case, we will first discuss
 14 “economic danger” as it applies and does not apply to Harbour. Before his arrest in
 15 December 2021, Harbour was both employed at Shea-Connelly Development, LLC
 16 (“SCD”) *and* was to participate with a percentage of the sales proceeds and development
 17 fees in a number of developments in the Valley orchestrated by Bart Shea along with the
 18 Santa Clarita property in California. Two things are certain: 1) Shea admits that Harbour
 19 was to participate in the development deals and 2) Shea contends that, having fired
 20 Harbour, his participation is ended and he will get nothing.² While it is yet to be seen
 21 whether Harbour’s participation in the Arizona development deals result in gains to offset
 22 the advances provided in 2021, it is clear that those issues will not be resolved any time
 23
 24

25
 26 ² Shea contends that Harbour was never supposed to participate in Santa Clarita, but this
 27 is false. However, since the Santa Clarita deal has *apparently* cratered, it may make no
 28 difference.

1 soon. Therefore, it may safely be said that Shea has cut-off Harbour. The money received
2 for his benefit from Shea through loans to SCD by Daryl Deel no longer exists. Shea's
3 termination of his relationship has coincided with Deels' complete abandonment of
4 Harbour. Finally, Kenny Bobrow, formerly a father figure to Harbour (according to Shea)
5 has also abandoned him, sued him, and, along with Shea, become a government witness
6 against him.

7 Harbour is, therefore, entirely bereft of funds and funding sources other than from
8 his own family members. He is basically as much of an economic danger to the
9 community as is the average homeless person. He has no job and no sources of income.
10 He will live in Abby Harbour's parents' Fountain Hills home for free, if released. With
11 the vehicle leased by SCD for the Harbour's having been surrendered, as this
12 memorandum is written, the Harbours do not even have a car.
13

14 How then, can Harbour constitute an economic danger to the community? There is
15 simply no way. He has no money and no property. There is no one from whom he can
16 raise money other than from his own family.
17

18 II. The Process Through Which the Presumption is Rebutted Militates in Favor
of Setting Conditions of Release.
19

20 The rebuttable presumption allows a defendant to demonstrate that conditions of
21 release exist that will ensure the safety of the community. We have proposed conditions,
22 which will be supplied to the Court in a separate document, showing that this is so. *See,*
23 *United States v. Dillon*, 938 F.2d 1412 (1st Circ. 1991); *Suppa*, 799 F.2d at 199; *United*
24 *States v. Dominguez*, 783 F.2d 702, 706 n.7 (7th Cir. 1986); *United States v. Contreras*,
25
26
27
28

1 776 F.2d 51 (2d Cir. 1985); *United States v. Hazime*, 762 F.2d 34, 37 (6th Cir. 1985);
 2 *United States v. Mosuro*, 648 F. Supp. 316, 318 (D.D.C. 1986).

3 A defendant must only produce *some* evidence to overcome the rebuttable
 4 presumption. *Dillon*, 938 F.2d 1412, 1416. When a defendant produces such evidence,
 5 the burden of persuasion remains with the government and the rebutted presumption
 6 merely retains evidentiary weight. *Id.*; See also *United States v. Hir*, 517 F.3d 1081, 1086
 7 (9th Cir. 2008) *holding that* “Although the presumption shifts a burden of production to
 8 the defendant, the burden of persuasion remains with the government. A finding that a
 9 defendant is a danger to any other person or the community must be supported by “clear
 10 and convincing evidence.”

13 III. Section 3142(b) Suggests Release is Appropriate.

14 Once *some* evidence has been provided to rebut the presumption, the new
 15 mortgage fraud offenses are bailable as a matter of right. The strength of the
 16 government’s case is against Harbour is pitifully weak. 1) What was the fraud, if there
 17 was one? It was the use of the \$100,000 gift letter at the closing; not anything else.³ In
 18 this regard, we cannot assume that there was a mortgage fraud at all. The evidence – e.g.,
 19 Government Exhibit 70 – shows that Frank Madea, Equitable’ s 100% owner, was,
 20 obviously, the source of the demand for a gift letter. No one else would have demanded
 21

24 ³ The \$242,000+ gift letter cannot not be shown to have been received by Equitable nor
 25 can it be shown that Harbour sent it but, assuming it was received, it was received a full
 26 month after the loan closed and sold to 5th Street Capital. Therefore, the \$242,000+ gift
 27 letter was not material to the transaction. By way of contrast, the \$100,000 gift letter was
 28 definitely received but who sent it cannot be known since Equitable does not retain
 emails.

1 it. Why did he need the gift letter? Because he had already pre-sold the Shea loan to 5th
 2 Street Capital. Obviously, he did not do that for free. As the District's premier mortgage
 3 fraud prosecutor, this prosecutor knows that beyond peradventure.

4
 5 There is nothing *per se* illegal about closing a loan with borrowed funds. Even
 6 Fannie Mae permits it.⁴

7
 8 The crime is mispresenting that the borrowed funds were a gift. But Equitable
 9 could not have been a victim because it knew that the funds to close were not coming
 10 from the buyer. We can see in Exhibit 70, the genesis of the idea for the gift letter. Where
 11 did the idea *and* the gift letter template come from? From Frank Madea. So, Equitable is
 12 not a fraud victim. Is 5th Street Capital? If so, it is Madea's and Equitable's victim. Was
 13 Madea indicted? Kenny Bobrow signed the \$100,000 gift letter. Bobrow knew he had not
 14 made a gift of \$100,000 to Shea. He loaned \$100,000 to Shea and another \$40,000 to
 15 boot and Shea has acknowledged he will pay Bobrow back when the house sells. Was
 16 Bobrow indicted?

17
 18 Bart Shea admitted he had timely knowledge about the \$100,000 gift letter. He
 19 said that Harbour brought it into his office, he threw him out, and told Harbour to "take
 20 care of it." Take care of what and why? And what did Shea mean by "take care of it?" Is
 21 Shea indicted? Where did he think the other \$200,000 came from? Our document
 22 examiner said he "probably" signed the Gottschalk loan and he told Ashley Adams he
 23 signed it. After all, where did Shea think the funds for closing came from? The tooth

24
 25
 26 4 "Borrowed funds secured by an asset are an acceptable source of funds for the down
 27 payment, closing costs, and reserves, since borrowed funds secured by an asset represent
 28 a return of equity.") (Fannie Mae Selling Guide, B3-4.3-15: 10/30/2009).

1 fairy? Shea stood to clear \$3 million from the purchase, renovation, and sale that he
2 would share 50/50 with Ken Akimoto. Madea was going to make money on the sale of
3 the note to 5th Street Capital. The real estate agents would make their money. Every
4 single participant in the 2123 Georgia Property except Harbour was going to get money
5 from the transactions but only Harbour is indicted. The government's mortgage fraud
6 case, though creatively and excessively pleaded, is very, very weak and it can never
7 improve. It is noteworthy that the only interview of Madea produced was the October 1st
8 interview. We assume that his counsel has told him to stop talking. He is, after all, the
9 most likely suspect in a mortgage fraud.

12 Harbour came here with his parents. His father passed but his mother remained.
13 His sister and family live here. His wife, whose medical issues are known, and the
14 Harbour's two daughters, 11 and 8, live here. He is a member of the Phoenix
15 Thunderbirds was formerly on the Fiesta Bowl Committee, attends St. Thomas the
16 Apostle and has a long association with its school. He engaged in philanthropy when he
17 was able. As Bobrow told the agents, he and Abby are fabulous parents. His sole ties are
18 to this community. He is, obviously, not a flight risk and his loss of sources of money,
19 already explained, must reverse any notion that he is a flight risk or a danger. Go where?
20
21 Using what?

23 Harbour has every reason to fight this case and, while anything can happen, my
24 51+ years in criminal law and 40+ in white collar work strongly suggests the government
25 has completely misunderstood this case. It is time to release Harbour. He is no danger to
26 anyone or anything.

1 RESPECTFULLY SUBMITTED this 27th day of June 2022.

2 CHRISTIAN DICHTER & SLUGA, P.C.

3

4 By: /s/ Stephen M. Dichter

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11

12 **CERTIFICATE OF SERVICE**

13 I hereby certify that on June 27, 2022, I electronically transmitted the attached
14 document to the Clerk's Office using the CM/ECF system for filing and for transmittal
15 of Notice of Electronic Filing to the following CM/ECF registrants:

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27

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